UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DONNA G. BOWDEN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-297-P-H***
	)	
BILL DODGE BUICK-GMC TRUCK, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff moves for summary judgment as to liability on Count II of her amended complaint[1] in this action alleging a failure to provide leave in accordance with the terms of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2611 *et seq*. I recommend that the court deny the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the

[1] The plaintiff states that the parties have agreed to dismiss Count I of the two-count amended complaint (Docket No. 2), Plaintiff's Motion for Partial Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 8) at 1 n.1, but no stipulation of dismissal has yet been filed with the court.

nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the parties' submissions. Defendant Bill Dodge Buick-GMC Truck, Inc. is a Maine corporation with offices located in Westbrook, Maine.[2] Plaintiff's Statement of Undisputed Material Facts ("Plaintiff's

[2] The amended complaint lists five corporate "Bill Dodge" defendants. Plaintiff's First Amended Complaint (Docket No. 2) at 1-3. The plaintiff refers to a single defendant, Bill Dodge Buick-GMC Truck, Inc., throughout her submissions in connection with the motion for summary judgment. The papers submitted in opposition to the motion refer variously to this single defendant and to "defendants." *Compare* Objection to Plaintiff's Motion for Partial Summary Judgment, etc. ("Defendant's Objection") (Docket No. 13) *with* letter from Marshall J. Tinkle to William Brownell, Clerk, dated July 14, 2000 (Docket No. 15). I assume that the parties intend all named defendants to be bound by the court's ruling on this motion and that they refer to a single defendant as a matter of convenience, as I will do.

SMF") (Docket No. 9) ¶ 1; Defendant Bill Dodge's Statement of Material Facts ("Defendant's Responsive SMF") (Docket No. 14) ¶ 1. At all relevant times, the defendant did business as "Classic of Westbrook." *Id*. At the time her employment was terminated, the plaintiff was working as a customer service manager at the defendant's Classic of Westbrook automobile dealership. *Id.* ¶ 3. The plaintiff worked full-time, 7:30 a.m. to 7 p.m., four days a week. Defendant Bill Dodge's Statement of [Additional] Material Facts ("Defendant's SMF") (pages 3-5 of Docket No. 14) ¶ 1; Plaintiff's Response to Defendant Bill Dodge's Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 17) ¶ 1. Ralph Finch was the service director at the dealership and the plaintiff's immediate supervisor. Defendant's SMF ¶ 5; Plaintiff's Responsive SMF ¶ 5. He reported to Stacy Dodge, now Stacy Blackwell, who was the general manager of the dealership. *Id*.

In December 1996 the plaintiff told Finch and Blackwell that she was pregnant and was due on August 15, 1997. *Id*. ¶ 6. The plaintiff delivered her daughter prematurely on May 3, 1997. *Id*. ¶ 7. She was out of work form April 30 to May 12 or 13, 1997. Defendant's SMF ¶ 3; Plaintiff's Responsive SMF ¶ 3. Within two weeks of the birth, the plaintiff told Finch that the baby was going to stay in the hospital until it reached what would otherwise be full term, and that the plaintiff would take her maternity leave when the baby was released from the hospital. Plaintiff's SMF ¶ 7; Defendant's Responsive SMF ¶ 7. In early August 1997 the plaintiff told Finch that she would take 12 weeks of maternity leave beginning in the middle of August. *Id*. ¶ 8. No written documents were prepared reflecting the fact that the plaintiff's maternity leave would be considered leave under the FMLA or stating when the plaintiff would return to work. *Id*. ¶ 9. The plaintiff had no doubt that the defendant had agreed that she could use her leave for 12 weeks following her daughter's discharge. Defendant's SMF ¶ 8; Plaintiff's Responsive SMF ¶ 8. She did not seek written confirmation of this agreement.

Id. ¶ 9. The plaintiff started her maternity leave on August 19, 1997. Plaintiff's SMF ¶ 11; Defendant's Responsive SMF ¶ 11.

During her leave, the plaintiff approached Blackwell, and they agreed on the date on which the plaintiff's 12-week leave would expire. Defendant's SMF ¶ 11; Plaintiff's Responsive SMF ¶ 11. The plaintiff told Blackwell that her daughter was scheduled to have surgery around that time, and Blackwell told the plaintiff that she could take a few more days or a week off due to the surgery. Plaintiff's SMF ¶ 12; Defendant's Responsive SMF ¶ 12. The plaintiff and Blackwell then discussed whether part-time work was available for the plaintiff. Defendant's SMF ¶ 13; Plaintiff's Responsive SMF ¶ 13. Blackwell agreed to find out whether the dealership had any part-time work available. *Id.* Blackwell made inquiries and determined that no part-time position was available. *Id*. ¶ 14. Approximately two weeks later, Blackwell told the plaintiff that no part-time work was available. Plaintiff's SMF ¶ 13; Defendant's Responsive SMF ¶ 13. On the same day, the plaintiff turned in her keys to Finch; she never returned to work for the defendant. *Id*. The defendant recorded the plaintiff's date of termination as October 31, 1997. *Id*. ¶ 14.

The plaintiff filed this action on September 22, 1999. Docket.

III. Discussion

The parties agree that the defendant is subject to the FMLA. Plaintiff's SMF ¶¶ 2, 4; Defendant's Responsive SMF ¶¶ 2, 4; 29 U.S.C. §§ 2611(2) & (4), 2612(a). The plaintiff claims that in October 1997 she requested additional leave until December 1997 "before returning to a full time position," that she was entitled to "at least another 12 weeks of FMLA leave" at that time because the defendant had not provided her with written notice that it was designating her leave that began in August as FMLA leave as required by 29 C.F.R. § 825.208, and that the defendant violated the FMLA both by ordering her to return to work full-time before the initial 12-week period was over and by not

offering her reinstatement to her former job, or an equivalent position, at the end of the additional period of leave. Plaintiff's Motion at 6-7. The defendant responds that there was no need to make such a written designation under the circumstances, that the plaintiff did not provide sufficient notice in October that she was seeking FMLA leave, that the plaintiff quit her job, that it did not order the plaintiff to return to full-time work before November 12, 1997, and that the regulation on which the plaintiff relies is invalid and unenforceable. Defendant's Objection at 5-9.

It is necessary to address first the defendant's contention that the plaintiff voluntarily quit her job when she turned in her keys before the expiration of 12 weeks from the day in August 1997 when she began her maternity leave, because a voluntary resignation would terminate any claim under the FMLA. *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir. 1999). Most of the evidence on this point comes from the plaintiff's own deposition testimony. She testified that she went to the dealership after a telephone conversation in which Blackwell told her that there would be no part-time work available, handed her keys to Finch, and said "here are my keys, apparently if I don't come back to work November 1st I'm done." Excerpts from Deposition of Donna G. Bowden ("Plaintiff's Dep."), Exh. B to Affidavit of David M. Hirshon (Docket No. 11), at 68. She then "went behind the counter, got [her] things, [her] name tag, things like that, went into the shop, said goodbye to the guys and left." *Id*. at 69. She told a Mr. Lane, who was behind the service counter, that she "was all done" and that "Stacy said if [she] didn't come back November 1st [she] would be terminated and [she] couldn't do that." *Id*. at 69-70.[3] She told Walter, a technician, that she was "all done . . . not working there any more." *Id*. at 70. According to Finch, the plaintiff handed him her keys and said "I guess you want these." Excerpts from Deposition of Ralph B. Finch, Jr., Exh. E to Plaintiff's SMF, at 13.

[3] The factual assertion that Blackwell told the plaintiff that she must return to full-time work on November 1 or be terminated is disputed by the defendant. Excerpts from Deposition of Stacy E. Blackwell, Exh. C to Affidavit of David M. Hirshon, at 19-20.

The plaintiff contends that she did not resign voluntarily because she did not say "I quit" or "I resign" and because she was told that she must return to full-time work on November 1, a date which both parties agree was before the expiration of 12 weeks from the date on which the plaintiff began her maternity leave, which she could not do because she did not have day care available for her child at that time. Plaintiff's Motion at 7-8. Whether particular conduct constitutes resignation is a question of state law, *Hammon*, 165 F.3d at 447-48, a point which is ignored by both parties in this case. However, I have been unable to locate any Maine case law on point in my own research. This court has held that a plaintiff's statement that "we are going to part company" does not constitute quitting a job for purposes of the FMLA as a matter of law, *Watkins v. J & S Oil Co.*, 977 F. Supp. 520, 523 (D. Me. 1997), and the First Circuit has held that this statement could reasonably be found by a jury not to be equivalent to a voluntary resignation, *Watkins v. J & S Oil Co.*, 164 F.3d 55, 60 (1st Cir. 1998). This suggests that, while a direct statement of resignation is not a legal requirement, *see, e.g., Hammon*, 165 F.3d at 448 (Ohio law); *Piecuch v. Cook County Sheriff's Merit Bd.*, 726 N.E.2d 22, 28-29 (Ill. App. 2000); *Govier v. North Sound bank*, 957 P.2d 811, 817 (Wash. App. 1998), the statements made by the plaintiff when she returned her keys, as she reports them, and the act of returning the keys itself, could reasonably be interpreted as something less than a voluntary resignation; on the other hand, it does not suggest that only that interpretation is possible as a matter of law. This question must be resolved by the factfinder at trial. *See Parsons v. Chasse*, 159 Me. 463, 471 (1963) (question whether physician who "turned in" his license to state registration board did so under duress and therefore actually resigned must be resolved by trial court after hearing); *Healion v. Great-West Life Assurance Co.*, 830 F. Supp. 1372, 1375 (D. Colo. 1993).

Accordingly, the plaintiff is not entitled to summary judgment on the issue of liability at this stage of the proceedings, because it is possible that a jury will find that she resigned voluntarily. That is essentially the end of the matter. It is not necessary to reach the other issues raised by the parties.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for partial summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 28th day of July, 2000.

David M. Cohen
United States Magistrate Judge

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